PERBADANAN KEMAJUAN NEGERI PERAK

v.

ASEAN SECURITY PAPER MILL SDN. BHD.

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. AZMI SCJ
GUNN CHIT TUAN SCJ
[SC CIVIL APPEAL NO. 02-166-1991]
19 SEPTEMBER 1991

ARBITRATION: *Disputes arising out of contract - Arbitration clause - Writ action commenced - Whether stay should be granted pending arbitration - Discretion of Court - Wording of arbitration clause - Meaning of 'dispute' - Absence of developed or fully blown dispute or difference before issue of writ - Whether ground for refusing stay - Weakness in case should not be used to brush aside arbitration clause - Arbitration Act 1950, s. 6.*

A sale and purchase agreement and a use of land agreement was executed between the appellant PKNP and respondent ASPM on 16 January 1987. By virtue of the sale and purchase agreement, PKNP agreed to sell and ASPM agreed to purchase certain pieces of land in the Mukim of Lumut in the State of Perak. As a result of the apparent inaction of ASPM, on 2 October 1989 the solicitors for PKNP wrote to the solicitors of ASPM indicating their intention to declare default under cl. 3 of the use of land agreement and also under the sale and purchase agreement. Both agreements contained identical arbitration clauses.

On 1 February 1990, the day following the deadline provided in the use of land agreement, PKNP took out a writ seeking orders for return of the land titles and the memorandum of transfer executed by PKNP, retransfer of the 4 land titles to PKNP and discharge of the 2 charges given to Public Bank Bhd. with respect to the said titles. The writ also sought damages in the alternative for breach of contract.

On 19 February 1990 PKNP took out a summons in chambers for summary judgment under O. 81 of Rules of the High Code 1980 and on 29 June 1990, ASPM took out a summons in chambers for an order of stay pursuant to s. 6 of the Arbitration Act 1950 (the Act).

The learned Judge of the High Court heard the two applications together and held that there were triable issues which should go to a full hearing and that if the other party seeks to enforce the arbitration clause, PKNP could not choose not to be governed by the arbitration clause contained therein. This was the appeal by the appellant.

The issue was the Court's attitude to an arbitration clause of the nature that appears in these two agreements. PKNP argues that the arbitration clause does not arise because ASPM's allegations do not amount to a genuine dispute or difference within the meaning of the arbitration clause. It was also PKNP's contention that the dispute or difference was never raised before the issue of the writ.

Held:

[1] The words in s. 6 of the Act namely, "in respect of any matter agreed to be referred to arbitration", "if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement", and that the applicant was at the time when the proceedings were commenced and "still remains ready and willing to do all things necessary to the proper conduct of the arbitration" constitute the necessary conditions before an order of stay is granted.

[2] In an application pursuant to s. 6 of the Act the Court had a discretion whether or not to grant stay. The language of s. 6 of the Act is such that if the party which opposes the application for stay can show sufficient reason why the matter should not go to arbitration, the Court should not normally grant stay.

[3] The arbitration clause in this case is very wide and does not only speak of all disputes but also all differences and questions which may arise not at any specific time but at any time.

[4] The Court's discretion was exercised properly and therefore the order for stay granted should not be disturbed. Although the dispute or difference may not have been raised by ASPM, there is ample evidence that it was raised in the various correspondences of ASPM's contractors.

[5] The absence of a developed or fully blown dispute or difference at the date of the issue of the writ is not a ground for refusing stay, if the Court finds there is a dispute or difference, for to hold otherwise would encourage a claimant who was subject to an arbitration agreement but who did not wish to go to arbitration, to rush to Court at an early stage in order to defeat the arbitration agreement.

[6] The fact that there is apparent weakness in the respondent's case should not be taken as an excuse to brush aside an arbitration clause to which the appellant was a party and which was being insisted on by the respondent.

[Appeal dismissed with costs.]

[**Bahasa Malaysia** Translation of Headnotes]

TIMBANGTARA: *Pertikaian dalam kontrak - Fasal timbangtara - Tindakan writ dimulakan - Sama ada penggantungan patut dibenarkan sementara menunggu timbangtara budibicara mahkamah - Penggunaan perkataan dalam fasal timbangtara - Makna menolak penggantungan - Kekurangan dalam kes tidak seharusnya digunakan untuk mengenepikan fasal timbangtara - Akta Timbangtara 1950, s. 6.*

Satu perjanjian jual-beli dan perjanjian penggunaan tanah telah dibuat di antara perayu PKN dan responden ASPM pada 16 Januari 1987. Melalui perjanjian jual-beli itu PKN bersetuju untuk menjual dan ASPM bersetuju untuk membeli beberapa keping tanah di Mukim Lumut dalam Negeri Perak. Akibat ketiadaan tindakan selanjut dari ASPM pada 2 Oktober 1989 Peguam bagi PKN menulis kepada Peguam ASPM memberitahu hasrat mereka untuk mengisytiharkan keingkaran di bawah fasal 3 perjanjian penggunaan tanah dan juga di bawah perjanjian jual-beli itu. Kedua-dua perjanjian itu mengandungi fasal timbangtara yang sama.

Pada 1 Februari 1990, iaitu satu hari selepas tamatnya tempoh yang tersebut dalam perjanjian penggunaan tanah, PKN telah memfailkan satu writ dan memohon perintah untuk pemulangan hak-milik tanah serta memorandum pindahmilik yang dilaksanakan oleh PKN, pindahmilikan semula 4 hakmilik tanah kepada PKN dan pelepas 2 gadaian yang diberi kepada Public Bank Bhd. berhubung dengan hakmilik itu. Writ itu juga memohon gantirugi bagi kemungkiran kontrak.

Pada 19 Februari 1990 PKN memfailkan satu saman dalam kamar bagi penghakiman terus di bawah A. 81 Kaedah Mahkamah Tinggi, KMT 1980 dan pada 29 Jun 1990 ASPM juga telah memfailkan satu saman dalam kamar memohon satu perintah penggantungan menurut s. 6 Akta Timbangtara 1950 (Akta tersebut).

Hakim Mahkamah Tinggi yang arif mendengar kedua-dua permohonan itu serentak dan memutuskan bahawa terdapat perkara-perkara yang boleh dibicarakan yang hanya boleh diputuskan selepas perbicaraan penuh; dan jika pihak yang satu lagi ingin menguatkuasakan fasal timbangtara itu maka PKN tidak boleh mengelak dari ikatan fasal timbangtara yang terkandung dalam perjanjian itu. Ini adalah rayuan oleh perayu.

Isu untuk dipertimbangkan adalah sikap Mahkamah terhadap fasal timbangtara seperti yang terkandung dalam kedua-dua perjanjian itu. PKN berhujah bahawa fasal timbangtara itu tidak timbul kerana hujah-hujah ASPM bukanlah pertikaian benar atau perbezaan dalam makna fasal timbangtara itu. PKN mengatakan bahawa pertikaian itu atau perbezaan itu tidak ditimbulkan oleh ASPM sebelum writ itu difailkan.

Diputuskan:

[1] Perkataan yang terkandung dalam s. 6 Akta tersebut iaitu "berhubung dengan mana-mana perkara yang dipersetujui untuk kepada timbangtara", "jika boleh ditunjukkan bahawa tidak terdapat alasan yang mencukupi mengapa perkara itu tidak patut dirujuk menurut perjanjian timbangtara" dan bahawa pemohon pada masa prosiding itu dimulakan "masih bersedia dan sanggup membuat semua perkara yang perlu bagi mengadakan timbangtara" merupakan semua syarat yang perlu sebelum satu perintah penggantungan dibenarkan.

[2] Dalam satu permohonan di bawah s. 6 Akta tersebut Mahkamah mempunyai kuasa budibicara sama ada untuk membenarkan atau menolak penggantungan prosiding. Setelah diteliti penggunaan bahasa dalam s. 6 Akta tersebut bermakna bahawa jika satu pihak yang membangkang permohonan untuk penggantungan boleh menunjukkan terdapat alasan yang mencukupi bagi membuktikan bahawa perkara itu tidak perlu dirujuk kepada timbangtara, Mahkamah tidak patut membenarkan penggantungan.

[3] Fasal timbangtara dalam kes ini adalah amat luas dan bukan sahaja meliputi semua pertikaian, perbezaan dan persoalan yang mungkin timbul bukan pada masa tertentu tetapi pada bila-bila masa.

[4] Pemberian perintah penggantungan itu tidak seharusnya diganggu kerana Mahkamah telah menggunakan budibicara yang berpatutan. Walaupun pertikaian atau perbezaan itu tidak dibangkitkan oleh ASPM, terdapat keterangan yang mencukupi bahawa ia telah dibangkitkan dalam persuratan dari kontraktor ASPM.

[5] Ketiadaan satu pertikaian besar atau pertikaian yang diperbesarkan atau perbezaan pada tarikh writ itu dikeluarkan bukannya satu alasan bagi menolak permohonan penggantungan, jika Mahkamah berpuas hati bahawa terdapat pertikaian atau perbezaan, kerana untuk memutuskan sebaliknya akan menggalakkan pemohon yang tertakluk kepada perjanjian timbangtara tetapi yang tidak ingin perkara itu dirujuk kepada timbangtara, memohon ke Mahkamah pada peringkat awal bagi tujuan mengenepikan perjanjian timbangtara.

[6] Walaupun jelas terdapat kekurangan dalam kes responden, fakta ini tidak seharusnya digunakan sebagai alasan untuk mengenepikan fasal timbangtara yang mana perayu adalah satu dari pihak terlibat dan yang ingin dikuatkuasakan oleh responden.

[Rayuan ditolak dengan kos.]

Cases referred to:

Arulandan v. Malaysian Co-operative Insurance Society Ltd. [1987] CLJ (Rep) 44 ***(cit)***
Co-operative Central Bank Ltd. v. Hj. Rosli bin Hj. Kamaruddin [1991] 1 CLJ (Rep) 61 ***(cit)***
The Evje [1974] 2 Lloyd's Rep 57 ***(cit)***
The "Fuohsan Maru" [1978] 1 Lloyd's Rep 24 ***(cit)***

Gujarat State Co-operative Land Dvpt. Ltd. P.R. Mankad & Anor. [1979] AIR 1203 ***(cit)***
London & North Western & Great Western Joint Railway Companies v. J.H. Billington Ltd. [1899] AC 79 ***(cons)***
Professor Dr. A. Kahar Bador & Ors. v. N. Krishnan & Ors. [1983] 1 MLJ 412 ***(cit)***
Scott v. Avery 10 ER 1121 ***(cit)***
Willerford v. Watson [1873] 8 Ch 473 ***(cit)***

Legislation referred to:
Arbitration Act 1952, s. 6
Arbitration Act 1975 [UK], s. 4(1)
Co-operative Societies Act 1948, s. 49(1)
Rules of the High Court 1980, O. 81

Other source referred to:
Halbury's Laws of England, 4th Edn. paras. 560-565

For the appellant - W.S.W. Davidson; M/s. Azman, Davidson & Co.
For the respondent - Ranjit Singh (J.S. Olikh with him); M/s. Ranjit Singh & Co.

[**Editor's Note:** The High Court judgment was reported in [1991] 1 CLJ (Rep) 436.]

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

Amidst considerable fanfare (borrowing the words of the learned Judge Peh J) what was called an Asean project (a mill for the manufacture of high quality security paper) was launched in early 1987 in the State of Perak. This so-called Asean project was actually grounded on two written agreements between the Perbadanan Kemajuan Negeri Perak, that is the State Development Corporation established under the Perak State Development Corporation Enactment 1967 (the appellant) and a company named Asean Security Paper Mill Sdn. Bhd. (the respondent).

The two agreements were executed by the parties on 16 January 1987. One was the sale and purchase agreement and the other is a supplementary agreement of the same date called the use of land agreement. By virtue of the sale and purchase agreement the appellant agreed to sell and the respondent agreed to purchase certain pieces of land in the Mukim of Lumut in the State of Perak.

The learned Judge set out what he considered as the essential contents of the two agreements in his grounds of decision as follows:

> By an agreement made on 16 January 1987 the plaintiff agreed to sell and the defendant agreed to purchase the said lands for the price of RM3,844,954.08 out of which a sum of RM158,673.05, being deposit, was paid in a certain manner with the balance in the sum of RM3,646,281.03 to be paid or satisfied by the issue by the defendant to the plaintiff of 5% cumulative participating preference shares in the defendant, credited as fully paid up and redeemable on certain terms.
>
> *Inter alia*, the defendant agreed to erect, complete and commission the paper mill by 31 January 1990.
>
> By a supplementary agreement of even date, *inter alia*, both parties reaffirmed the date of 31 January 1990 aforesaid, and stipulated for the delay on grounds of fire, acts of war etc. which would be permitted by compensating extension of time. The relevant ground in this case for the delay was a fire which took place subsequently.

In our view there are also other provisions in both the agreements which are material for the

purpose of this appeal. For example, cls. 6.1 and 6.2 of the sale and purchase agreement and cls. 1, 2 and 3 of the use of land agreement.

For convenience cls. 6.1 and 6.2 of the sale and purchase agreement are reproduced below:

6.1 PKNP shall use their best endeavours to assist the company in the following matters:

(a) the use by the company of all access roads for the industrial estate to the land that the Perak State Government or PKNP has control over and ensuring the proper maintenance of the said roads by the appropriate authorities;

(b) the procurement from the Lembaga Letrik Negara of a minimum electricity supply of six megawatts at eleven kilo-volts to the paper mill on the mill-site before 31 March 1987 and also the procurement of a preferential tariff in respect of the said electricity supply to the best possible terms;

(c) the procurement from the Jabatan Bekalan Air of a minimum supply of one thousand and five hundred (1,500) cubic metres of water before 31 March 1987 and also the procurement of a preferential tariff in respect of the said water supply to the best possible terms;

(d) the appeal to the appropriate authority for the reduction of the quit rent in respect of the land to the best possible terms;

(e) the appeal to the appropriate authority within nine (9) months from date hereof for the removal of the restriction in interest clause in the individual issue documents of title to the land, whereby the Perak Menteri Besar's consent is presently required for the transfer or sub-lease of the land.

(f) the procurement by the company from the Department of Immigration a reasonable number of work passes and immigration clearance for the entry into and exit from the State of Perak of workers and staff which the company may require for the construction, installation, commissioning and efficient management of the project mill.

6.2 PKNP shall treat the erection, completion and commissioning of the project mill as a priority project and shall generally assist the company in obtaining the necessary approvals from the appropriate authorities for the electricity and water supplies and other necessary facilities.

Clauses 1, 2 and 3 of the use of land agreement read as follows:

1. The company covenants and agrees that subject to cl. 2 below it will at its own expense erect, complete and commission the project mill by 31 January 1990.

2. If the erection, completion or commissioning of the project mill is delayed as a result of any failure on the part of PKNP to fulfil any of its obligations under the sale & purchase agreement or as a result of any strikes, lock-outs, fire, lightning, explosion, flooding, riots, civil commotions, acts of war, malicious, mischief or theft, the company shall be entitled to such reasonable extension of the said period as may be required to compensate for the said delay.

3. If the company fails to comply with its said obligations within the period stipulated in cl. 1 with such extension as the company may be entitled to claim under cl. 2 above, PKNP shall have the right in its absolute discretion to declare the company in default of this agreement, whereupon the sale & purchase agreement shall become null and void and of no further effect. In such event the sum referred to in recital 1(a) above shall be absolutely forfeited to PKNP by way of liquidated damages, and the company shall forthwith retransfer the land to PKNP free from all charges and encumbrances at the company's own cost and expense if the transfer by PKNP to the company has already been completed.

One feature which stands out in the provisions reproduced above is that despite the ultimate

right of the appellant to declare default, the project was a sort of joint venture project in the sense that the appellant under the caption "obligations of PKNP" was also given the responsibility to assist the respondent in a number of important matters like assisting the respondent in procuring the rights for water and electricity facilities from the relevant government or statutory agencies.

In addition, cl. 10 of the sale and purchase agreement vests on the appellant the sole responsibility of evicting squatters from the land.

Looking at the provisions of the agreements reproduced there was certainly a mutuality of interest between the parties and there were contractual liabilities on both the appellant and the respondent to make the project a success.

An arbitration provision is contained in cl. 13 of the sale and purchase agreement and cl. 5 of the use of land agreement. The arbitration clauses are identically worded as follows:

> All disputes, differences and question which may at any time arise between the parties hereto or their respective representatives or assigns touching or arising out of or in respect of this agreement or the subject matter thereof shall be referred to a single arbitrator. In case the parties cannot agree upon a single arbitrator then two arbitrators will be appointed one to be appointed by each party to the agreement in accordance with and subject to the provisions of the law relating to arbitration in Malaysia as may be in force from time to time.

As far as can be ascertained from the affidavits filed there was a relative silence between the parties after the launching of the project although there is some evidence that preliminary works were being undertaken by the respondent. Despite the fact as stated earlier that the project should be regarded as a sort of joint project between the appellant and the respondent, the appellant became agitated with the apparent inaction of the respondent and as the deadline was approaching nearer and nearer letters from the appellant to the respondent became more and more urgent and threatening. The following extract of a letter from the solicitors of the appellant to the solicitors of the respondent dated 7 December 1988 reflects what appears to be a strained relationship between the partners of the project during the material period.

Delay in Completion of the Project Mill

> 9. Your clients are under a contractual duty to complete and commission the project mill by 31 January 1990. The letter from Whitefield Technical Services Ltd. dated 25 July 1988 appears to be clear confirmation that start up of the project can only be by the end of 1990 and not earlier. Accordingly, the press statement to the effect that the mill would be operative "as scheduled" by 1991 is not accurate.
>
> 10. We are fully aware of the fact that cl. 2 of the use of land agreement contains a provision for extension of time for completion of the mill in certain situations. If your clients are of the view that they are entitled to any extension of time under this clause, they would be well advised to put up a formal application to our clients for the required extension with supporting documentation rather than to assume that the date has been extended.

There was no reply to this letter. Two more letters were also sent. As time went on the situation did not improve and on 2 October 1989 the solicitors for the appellant wrote to the solicitors of the respondent indicating their intention to declare default under cl. 3 of the use of land agreement and also under the sale and purchase agreement. They wrote:

> 1. We refer to our letters to you dated 7 December 1988, 28 January 1989 and 23 March

1989 to which we have not received any reply. Copies of these letters are enclosed for your convenience.

2. We have been instructed to once again draw your attention to the provisions of cl. 1 of the use of land agreement and cl. 5 of the sale and purchase agreement, both of which require that your client should erect complete and commission the project mill by 31 January 1990.

3. As at date hereof it appears that your client have not even commenced construction of the project mill.

4. Our clients have instructed us to notify you that they require your clients to strictly comply with this provision, and that it is our clients' intention to take action to declare your clients in default under cl. 3 of the use of land agreement, and also under the sale & purchase agreement on 1 February 1990, unless the project mill has been satisfactorily completed and commissioned by that date or your clients have before that date shown cause to the contrary to our clients' satisfaction.

5. Please acknowledge receipt of this letter.

On 1 February 1990, that is the very day following the deadline provided in cl. 1 of the use of land agreement the appellant took out a writ asking for an order of the Court for the respondent to return to the appellant 11 land titles as well as the memorandum of transfer executed by the appellant and for also an order to retransfer 4 land titles to the appellant and for the discharge of the two charges given to Public Bank Bhd. with respect to the said titles. The writ also sought alternatively for damages for breach of contract.

The statement of claim alluded to the two agreements referred to earlier and stated that to date the respondent had transferred 4 land titles to its name and two of which were charged to the Public Bank Bhd. and a further 11 land titles still in the possession of the respondent. The statement of claim also referred to the show cause letter sent by the solicitors of the appellant to the respondent on 2 October 1989 as to why the agreements should not be terminated since the respondent had failed to erect, complete and commission the project mill by the deadline, 31 January 1990. It was finally alleged in the statement of claim that the failure of the respondent to offer an explanation for the delay or to request for extension of time had left the appellant with no alternative but to terminate the said agreements.

On 19 February 1990 the appellant took out a summons in chambers for summary judgment under O. 81 of the Rules of the High Court 1980. On 29 June 1990 the respondent took out a summons in chambers for an order of stay pursuant to s. 6 of the Arbitration Act 1950 (the Act). Both these summons in chambers were finally heard together on 20 August 1990.

At the outset it may be observed that the learned Judge had to deal with two applications which actually required him to apply different formal criteria. The criteria for the grant of summary judgment and for the grant of a stay are not the same.

The practice normally followed is that if a claimant believes that a defendant has nothing to defend and cannot fend off the judgment he may apply for summary judgment. However the enforcement of an arbitration clause would depend at the very outset on the wording of the arbitration clause itself.

A defendant on his part when facing similar application can either put up a plausible defence or obtain a stay by relying on an arbitration clause. In this case the appellant in the application for summary judgment believed that the respondent had no answer to the claim because the answer did not amount to a genuine dispute or difference.

It is a well settled principle of law that parties cannot by contract oust the jurisdiction of the Courts but parties may by contract covenant that no right of action will accrue until a third person (the arbitrator) has decided on any difference which may arise between the parties - *Scott v. Avery* 10 ER 1121. But the arbitration clause we have with us here is not a *Scott v. Avery* clause in that sense. The only principle involved in the present case is what is the Court's attitude to an arbitration clause of the nature that appears in the two agreements reproduced earlier.

It is also a well settled principle that where parties have agreed to refer disputes for arbitration and the Court is satisfied that a dispute exists, but one of the parties to the contract commences an action to have the matter determined by the Court the *prima facie* stand of the Court is to stay the action and allow the parties to go to the tribunal to which they have agreed. In other words once the party applies for a stay and there is a dispute within the meaning of a valid and subsisting arbitration clause the inclination of the Court is that effect should be given to the arbitration clause.

However what the appellant here is saying is that the arbitration clause does not arise because what the respondent is saying now does not amount to a genuine dispute or difference within the meaning of the arbitration clause.

Section 6 of the Act reads:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings.

Although the language of s. 6 of the Act is not wholly identical with the language of s. 4(1) of the corresponding English Act the material words are identical namely "in respect of any matter agreed to be referred to arbitration" and "if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement", and that the applicant was at the time when the proceedings were commenced and "still remains ready and willing to do all things necessary to the proper conduct of the arbitration." They constitute the necessary conditions before an order of stay is granted. All the conditions to be fulfilled for an order of stay are set out in paras. 560-565 of *Halbury's Laws of England*, Fourth Edn.

In an application pursuant to s. 6 of the Act the Court had a discretion whether or not to grant stay. Lord Denning in his dissenting judgment in *The "Fuohsan Maru"* [1978] 1 Lloyd's Rep 24 observed that unlike the English Arbitration Act 1975 which does not apply to domestic arbitration agreements but only to international arbitration agreements under the English 1950 Act the Courts have a discretion whether to grant stay or not.

The language of s. 6 of the Act is such that if the party which opposes the application for stay can show sufficient reason why the matter should not go to arbitration, the Court should not normally grant stay. It is of course the Court which must be satisfied that there is sufficient reason for the arbitration provision not to be complied with.

The learned Judge in this case would appear to have approached the task before him by considering the appellant's contention that there was no triable issue.

After examining the affidavits filed the learned Judge found the issues of facts to be still in dispute and therefore concluded that the matter should clearly be left to be tried. On the arbitration clause the learned Judge concluded that the plaintiff, being party to the agreement, cannot now choose not to be governed by the arbitration clause if the other party seeks to enforce the arbitration clause. It was, he said, the *prima facie* duty of the Court to act on the agreement, citing Selbourne LC in *Willerford v. Watson* [1873] 8 Ch 473:

> If parties choose to determine for themselves that they will have a domestic forum instead of resorting to ordinary Courts, then, ... a *prima facie* duty is cast upon the Courts to act on such agreement.

Based on materials available the conclusion of the learned Judge on the triable issues is in our view completely justified.

The language used in the arbitration clause in our case is very wide. It covers "all disputes, differences and question" which may rise "at any time" "touching or arising out of or in respect of" the contract between the parties and they "shall be referred" to arbitration. We do not think the arbitration clause can be misunderstood as to what is the actual intention of the parties, that is parties had agreed to go to arbitration to settle any dispute, difference or question.

In *"The Evje"* [1974] 2 Lloyd's Rep 57 the arbitration clause there also provided that all disputes from time to time arising out of the contract shall be referred to arbitration. The words "arising out of" became an issue of interpretation.

Viscount Dilhorne said at p. 66.

> In *Heyman v. Darwins Ltd.* [1956] 2 QB 410 Lord Porter said that the words 'arising out of a contract' have a wider meaning than the words 'under a contract' a view which was repeated by Lord Justice Sellers in *Government of Gibraltar v. Kenney* [1942] AC 356. Although the words are different, I must confess my inability to 'discern any difference in their content'.

In *Co-operative Central Bank Ltd. v. Hj. Rosli bin Hj. Kamaruddin* [1991] 1 CLJ (Rep) 61 this Court had to be satisfied as to the meaning of the word "dispute" to see whether the matter before the Court was a dispute "touching the business of the appellant" and therefore fell to be settled in accordance with the provisions of s. 49(1) of the Co-operative Societies Act 1948. In the course of the judgment this Court adverted to *Arulandan v. Malaysian Co-operative Insurance Society Ltd.* [1987] CLJ (Rep) 44 and *Professor Dr. A. Kahar Bador & Ors. v. N. Krishnan & Ors.* [1983] 1 MLJ 412 which held that the words "dispute touching the business of the co-operative society" must be given a wider interpretation. But as to what is the meaning of the word "dispute" *Gujarat State Co-operative Land Dvpt. Ltd. v. P.R. Mankad & Anor.* [1979] AIR 1203 was followed in which the word "dispute" was defined in the following terms:

> The term 'dispute' means a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other.

The arbitration clause in our case as emphasised earlier is very wide and does not only speak of **all disputes** but also **all differences and questions** which may arise not at any specific time but **at any time.**

It was the appellant's contention that the dispute or difference was never raised before the issue of the writ. On a proper appreciation of the background this cannot be true. It may not have been raised by the respondent but there is ample evidence it was raised in the various correspondences of the contractors of the respondent. For example there was the squatter problem which must surely be within the knowledge of the appellant since vacant possession was given only after a delay of one year. Looking at the affidavits filed, the squatter problem would seem to have prevented the study of the soil on the land and this fact was consistently reflected in correspondences exhibited. On 4 June 1987, about six months after the signing of the agreements, Malata Engineering Consultants Sdn. Bhd. wrote to the respondent complaining of their inability to conduct site investigation to commence building works because of the presence of squatters on the land. On 6 November 1987 the same consultants again wrote to the respondent with the same complaint. Vacant possession was given to the respondent only on 1 December 1987. It was contended by the respondent that the delay in giving vacant possession was the cause of the inability to carry out exhaustive soil test by the consultants and until the soil test could be completed the plans could not be approved. That seems to us to be a fair contention, at this stage at least. A proper conclusion can only be arrived at after a full hearing.

Apart from the delay of one year in granting vacant possession, there was also the question of the appellant's responsibility to arrange for approval of the plans and electricity supply. It can be observed from the correspondence that the respondent made the necessary application for electricity supply to the Lembaga Letrik Negara as early as 18 January 1988 after vacant possession was granted on 1 December 1987.

London and North Western and Great Western Joint Railway Companies v. J.H. Billington Ltd. [1989] AC 79 was cited on behalf of the appellant to support their contention that a dispute must be raised by the respondent before the issue of the writ. In *Billington* action was brought to recover a certain sum of money as charge for services rendered by the railway company. A Railway Act empowering the company to make the charge also enacted that any difference arising under the statutory provision shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party. The respondents gave notice to defend the action on the ground that the County Court had no jurisdiction to decide the matter as jurisdiction was ousted by the statute referred to. Earl of Halsbury LC said at p. 81:

> I propose to give no opinion upon the true construction of the statute, except this: that a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen; and I think that must mean a difference of opinion before the action is launched either by formal plaint in the County Court or by writ in the superior Courts.

In our view the absence of a developed or fully blown dispute or difference at the date of the issue of the writ, is not a ground for refusing stay, if the Court finds there is a dispute or difference, for to hold otherwise would encourage a claimant who was subject to an arbitration agreement but who did not wish to go to arbitration, to rush to Court at an early stage in order to defeat the arbitration agreement.

Once it is established that there has arisen a dispute or difference or question the language of s. 6 of the Act places on the plaintiff the burden to show that it ought not to be referred to arbitration. As correctly stated by the learned Judge the fact that there is apparent weakness in the respondent's case should not be taken as an excuse to brush aside an arbitration clause to which the appellant was a party and which was being insisted on by the respondent.

Much has been said about the silence of the respondent and the failure to respond to the letters of the solicitors of the appellant addressed to the solicitors of the respondent. In our view the special relationship between the appellant and the respondent as envisaged in the provisions of the agreement reproduced earlier in the judgment which provisions imposed on the appellant also the duty to ensure the success of the project destroys the effectiveness of the averments on the failure of the respondent to respond to the letters and the failure to apply for extension of time.

To summarise, once the party asking for the stay has satisfied the Court that there is a dispute, difference or question between the parties within the meaning of the arbitration clause then it is a question of exercising the discretion to grant or not to grant the stay. This discretion of the Court must of course be exercised judicially and exercised according to the proper principles of law. If the appellate Court is satisfied that the discretion was properly exercised, the order granted should not be disturbed.

Accordingly we dismiss the appeal with costs.

We wish to make one observation. It is regrettable that contractual provisions for arbitration can sometimes be abused. We wish to emphasise that surely it is not the intention of s. 6 of the Act to confer on a defendant the privilege of delaying proceeding to enable him to put off the day of judgment indefinitely. It should be the duty of everyone involved to see that the matter be expeditiously resolved.

The learned Judge in his grounds of decision has clearly expressed his view that there are triable issues and the application for summary judgment could not be entertained. He should then have dismissed the application for summary judgment.

The order of stay is upheld.

Deposit to respondent to account of taxed costs.

Also found at [1991] 3 CLJ 2400